In the Supreme Court

OF THE

United States

OCTOBER TERM, 1950

No. 532

R. DICKSON, Warden, California State Prison at San Quentin,

Petitioner,

vs.

JOSEPH JOE CHAVEZ and CLYDE BATES,

Respondents.

PETITION FOR A REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI.

STANLEY MOSK,

ARLO E. SMITH,

Attorneys for Petitioner.

In the Supreme Court
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OCTOBER TERM, 1960

No. 532

FRED R. DICKSON, Warden, California State Prison at San Quentin,
Petitioner,

vs.

MANUEL JOE CHAVEZ and CLYDE BATES,
Respondents.

PETITION FOR A REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI.

Fred R. Dickson, petitioner, prays that this Court grant a rehearing of its order of January 9, 1961, denying petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in the above entitled case as prayed for in the petition filed November 15th. 1960, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

I

THE OPINION OF THE COURT OF APPEALS IN THE PRESENT CASE IS IN DIRECT CONFLICT WITH THE SUBSEQUENT DECISION BY THIS COURT IN ROGERS v. RICHMOND, FILED MARCH 20, 1961.

The Court of Appeals has reversed the District Court and required the District Court to take evidence for the purpose of adjudicating the accuracy of transcribed statements introduced at the murder trial of respondents.

Such adjudication was ordered in the absence of any allegation in the petition for writ of habeas corpus of a "vital flaw" in the determination of the question by the State Court. Such readjudication was ordered in the absence of a claim that the undisputed testimony in the State record establishes the inaccuracy of the transcription. Such readjudication was ordered in the face of a waiver of these questions by the respondents' failure to present a proper objection in the trial Court and by their failure to present evidence to counter the undisputed evidence presented in the State Court as to the accuracy of the transcript.

The Court of Appeals also ordered the District Court to examine photographs introduced in the State murder trial for the purpose of determining whether or not appellants were prejudiced. This determination was ordered with the instruction by the Court of Appeals that "the District Court is under no obligation to review the entire record in dealing with this question".

These rulings of the Court of Appeals are in direct conflict with the decision of this Court in the case of *Rogers v. Richmond*, decided March 20, 1961. This Court found a "vital flaw"—the use of an improper standard in testing the admissibility of a confession—which affected the reliability of the state findings of fact. Nevertheless this Court did not remand the case to the Federal Court for determination of the factual basis of the constitutional contention but remanded it to the State Court. The decision of the Court of Appeals in the present matter is in direct conflict with the *Rogers* decision. In the present case no *vital flaw* was alleged by the petition for writ of habeas corpus, there was no allegation that the undisputed testimony established the constitutional defect and there was a waiver of this question, nevertheless the Court of Appeals has ordered a redetermination of this question of fact.

Petitioner would concede that if a vital flaw is alleged and found to exist the case should be remanded to the District Court for redetermination of the factual question which is the basis of the constitutional contention; if respondents had alleged that the undisputed or uncontradicted testimony established a discrepancy in the transcriptions of constitutional significance, then the District Court must review the record (assuming no waiver of the question by failure to properly present it in the State Court). In spite of these circumstances the Court of Appeals has ordered a redetermination of the factual question. Such order is contrary to the decision of this Court in the case of

Rogers v. Richmond. It is likewise contrary to the decisions of the Court of Appeals and the District Court and the *Rogers* case, which were decided upon different grounds than the opinion of this Court.

The concern for the pre-emption of "functions that belong to state machinery in the administration of state criminal law" which this Court showed in the *Rogers* decision would certainly require a reversal of the decision of the Court of Appeals in the present case.

That portion of the opinion of the Court of Appeals which ordered the District Court to examine the photographs introduced at the murder trial to redetermine whether their introduction deprived defendants of due process is in direct conflict with the decision of this Court in the *Rogers* case. The Court of Appeals stated that the District Court is under no obligation to review the entire record in deciding this question. Petitioner has consistently contended that if this question is to be redetermined by the District Court it must be done only upon an examination of the entire record, including the evidence. The Court of Appeals would permit the District Court to decide the question of prejudice without examining the entire cause. This would seem to be "unfair" in a constitutional sense. Both parties are entitled to an evaluation of the prejudicial effect of anything occurring at the trial to be judged in the context of the entire cause, including the evidence. This Court in the *Rogers* case in referring to the determination of the voluntariness of a confession stated that this should not be established

in "abstraction from the whole living complex of a criminal trial . . ."

II

THE CONFLICT WHICH EXISTS BETWEEN THIS COURT'S DECISION IN ROGERS v. RICHMOND AND THE NUMEROUS OTHER CASES SUCH AS THE INSTANT CASE HAVE LEFT THE DISTRICT COURTS WITH A BEWILDERING SET OF ALTERNATIVES TO CHOOSE FROM IN DETERMINING THE PROCEDURE TO BE FOLLOWED IN HABEAS CORPUS CASES.

Innumerable conflicts exist between the opinions of the various Circuit Courts and the opinion of this Court in the case of *Rogers v. Richmond*. This Court has not rendered a full opinion on the question of the powers, duties and discretion of the District Court with reference to the taking of evidence on a factual question which is the basis of a federal question since the opinion in *Brown v. Allen* in 1952. The Court in the decision in *Rogers v. Richmond*, although granting the writ because of issues concerning appropriate procedure for dealing with petitions for writs of habeas corpus, disposed of the case on other issues. The procedural result of the *Rogers* decision has, however, left further areas of doubt as to the appropriate procedure for the District Courts and counsel to resolve. The other recent decisions of this Court have been *per curiam* decisions and have been no real guidance to the District Courts or to counsel in disposing of the some 800 petitions for writs of habeas corpus filed in the District Courts each year. There are no standards provided for the District Court in the de-

termination of these questions in death penalty cases which are as frequently as not presented on the eve of a scheduled execution. The conflict between the decisions leaves the various District Courts in confusion. This problem should be authoritatively determined by this Court and not left in conflict and doubt.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that a rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Ninth Circuit.

Dated, San Francisco, California,
April 25, 1961.

Respectfully submitted,

STANLEY MOSK,
Attorney General of the State of California.

ARLO E. SMITH,
Deputy Attorney General of the State of California.

Attorneys for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the rules of this Court.

Dated, San Francisco, California,
April 21, 1961.

ARLO E. SMITH,
Deputy Attorney General of the State of California,
Attorney for Petitioner.